

4 Official Opinions of the Compliance Board 58 (2004)

**EXCEPTIONS PERMITTING CLOSED SESSIONS – LEGAL ADVICE –
PRESENTATION ON COMPLIANCE WITH OPEN GOVERNMENT LAW,
HELD TO BE WITHIN EXCEPTION – COMPLIANCE BOARD –
AUTHORITY AND PROCEDURES – BOARD CANNOT COMMENT ON
PUBLIC BODY’S EXERCISE OF DISCRETION WHETHER TO INVOKE
EXCEPTIONS – “MEETING” – DINNER GATHERING AT WHICH PUBLIC
BUSINESS NOT DISCUSSED, HELD NOT TO BE A MEETING**

June 1, 2004

Mr. Jim Kennedy
The Aegis

The Open Meetings Compliance Board has considered your complaint that the Board of Trustees of Harford Community College (hereafter “HCC Board”) violated the Open Meetings Act. The complaint presented essentially three allegations, two specific and one more general. One specific allegation was that the HCC Board of Trustees violated the Open Meetings Act by holding a closed session on April 13, 2004, that should have been open. A second allegation was that, in November 2003 the HCC Board failed to comply with the Act when it participated in a telephone conference call concerning HCC’s nursing program. The more general complaint was that HCC Board has been engaged in a “continuing and concerted effort to conduct public business in private.” In a timely response on behalf of the HCC Board, Leslie R. Stellman, Esquire, denied all of the allegations in the complaint.

For the reasons explained below, the Compliance Board finds that there was no violation.

I

Closed Session on April 13

A. Complaint

The gist of the complaint is that a closed session was not warranted, given the topic: “The stated reason for closing the meeting to the public was to consult with legal counsel. During the closed session, ... there was to be a presentation [by] a lawyer hired by the Board to review a previous complaint investigated by the ... Compliance Board. This does not appear to have been a legitimate reason for closing the meeting for discussions with legal counsel as the Compliance Board had already

ruled on the matter at hand Furthermore, it was noted during the subsequent open portion of the meeting that the lawyer, Leslie Stillman [*sic*], also talked to the Board about the proper way to close Board meetings to the public. During the open portion of the meeting, [one trustee] asked if, during the closed session, Stillman [*sic*] talked to the Board members about anything that couldn't be disclosed in a public meeting." According to the complaint, Mr. Stellman responded "probably not." This portion of the complaint concluded with the following question: "If the subject matter covered in the closed session was appropriate to be discussed in public, then why was the session closed?"¹

B. Response

In his response, Mr. Stellman reported that, during the closed session, he "offered advice and counsel to members of the Board concerning compliance with the requirements of both the Maryland Open Meetings Act and the Maryland Public Information Act." Although this presentation was based on generally available materials, Mr. Stellman continued, "the Board was walked through the requirements of both laws ... and given the opportunity to ask questions about potential Open Meetings Act violations, including examples of circumstances common to college business, as well as Public Information Act liability in the event certain hypothetical situations came to pass."²

C. Analysis

Under §10-508(a)(7) of the Act,³ a public body may hold a closed session to "consult with counsel to obtain legal advice." The term "legal advice," while not defined in the Act, is generally understood to mean the lawyer's "interpretation and application of legal principles to specific facts in order to guide future conduct." Paul R. Rice, *Attorney-Client Privilege in the United States* 65 (2nd ed. 1999). In a case involving application of a comparably worded exception for the rendering of legal advice in Arizona's open meetings law, the Arizona Supreme Court described the exception as covering an attorney's discussion of various aspects of legislation, "including its meanings, legal scope, possible legal challenges, and [the lawyer's]

¹ The complaint did not allege any procedural irregularity in the closing of the April 13 meeting. That is, proper notice was given of the anticipated closed session, and the procedures required by the Act were followed.

² During the same closed session, another attorney for the HCC Board addressed it concerning the qualifications and selection of a specialized attorney who was to be engaged to review and investigate allegations about one of HCC's programs. This discussion is not the focus of the complaint.

³ All statutory references in this opinion are to the State Government Article, Maryland Code.

views concerning constitutionality, construction, and the like.” *City of Prescott v. Town of Chino Valley*, 803 P.2d 891, 896 (Ariz. 1990).⁴

In our view, the presentation by Mr. Stellman fell within the scope of legal advice. The Open Meetings and Public Information Acts, which were the subject of Mr. Stellman’s presentation, are hardly self-evident or self-executing. They require interpretation and application to the circumstances of a given public body, like the HCC Board. As we observed a few years ago, a “public body is entitled to meet in closed session to hear advice from its lawyer on how to comply with any of the laws that affect it,” including the Open Meetings Act. 3 *Official Opinions of the Maryland Open Meetings Compliance Board* 16, 20 (2002) (Opinion 00-5).

The fact that the basic framework for Mr. Stellman’s presentation consisted of material in the public domain did not foreclose invocation of the legal advice exception. A lawyer’s briefing of a client about statutory obligations will invariably include non-confidential information about the statute’s content and purpose. The legitimate basis for invoking the exception, however, is that the public body is *also* afforded the opportunity to gain the lawyer’s advice about applying the generalities in the statute to concrete situations and perhaps a risk assessment of following one course rather than another in gray areas.

According to Mr. Stellman’s response, that is exactly what happened during the April 13 closed session.⁵ Because we have no evidence that the discussion in closed session extended beyond this legal advice to the consideration of policy matters, we find that the April 13 closed session was lawful.

II

Alleged Conference Call

The complaint alleged that Joyce Jordan, the Dean responsible for HCC’s nursing program, “said she had a conference call with the Board of Trustees regarding the issue [of test scores by the program’s graduates] in late November [2003].” The complaint then cited minutes of the HCC Board’s November 11, 2003 meeting in which no reference to the nursing program appeared. The complaint inferred that some other, secret meeting occurred that month.

⁴ The Arizona court distinguished “discussion regarding the merits of enacting the legislation or what action to take based upon the attorney’s advice,” which the court characterized as “beyond the realm of legal advice and must be open to the public.” *Id.* We have adopted a similar view of the Maryland exception. *See, e.g.*, 1 *Official Opinions of the Maryland Open Meetings Compliance Board* 145 (1995) (Opinion 95-11).

⁵ The advice from another lawyer representing the HCC Board about engaging specialized counsel likewise fell within the legal advice exception. *See* note 2 above.

Had Dean Jordan engaged in a conference call with a quorum of the HCC Board, the Act might have applied to that conversation.⁶ As the Attorney General has pointed out, “a telephone conference call in which a quorum of members is conducting business simultaneously ... is a ‘meeting’ that must comply with the Act.” Office of the Maryland Attorney General, *Open Meetings Act Manual* 7 (4th ed. 2000). In this case, however, the alleged conference call never occurred. According to Mr. Stellman’s response and Dean Jordan’s supporting affidavit, Dean Jordan participated in a November 2003 conference call with members of the Maryland Board of Nursing, not the HCC Board. The comment attributed to Dean Jordan in the complaint reflected a misunderstanding, and this aspect of the complaint is factually unfounded.

III

Closed Meeting Practices Generally

A. Invocation of Exceptions

The HCC Board frequently closes meetings on the basis of one or more of the exceptions in the Act that permit closed sessions under specified circumstances. Although reflecting an obvious dislike for this practice, the complaint is ambiguous about the exact nature of the grievance. Some of the language in the complaint suggests that the offense is not illegal invocation of exceptions but instead the HCC Board’s habitual willingness to use legally available exceptions.

For example, the complaint pointed out that the HCC Board “voted to close its sessions 20 times in the two years prior to March 2004 and the stated reason for 17 of those closed sessions was to discuss personnel matters.” The frequency with which the HCC Board closed meetings for this reason, however, is hardly evidence of a violation. While the statement of legislative policy in §10-501 reflects a clear preference for open meetings, the policy statement also recognizes that there are “special and appropriate circumstances when meetings of public bodies may be closed” under the Act. §10-501(a) and (c). The consideration of a specific personnel matter is one such circumstance. Nothing in the complaint or response suggests that any of these meetings went beyond the scope of the personnel exception. The HCC Board, as the entity with ultimate authority and responsibility for the successful operation of the college, has an obvious interest in matters related to key personnel.

To the extent that the complaint is an argument that, although the HCC Board has legal authority to close many of its meetings, it ought not to do so, the

⁶ The application of the Act would depend on the content of the discussion. It is possible that such a discussion would fall within the “executive function” exclusion from the Act.

Compliance Board has no comment. The role of the Compliance Board is to review complaints that allege a violation of the Act and to issue an opinion whether a violation occurred. §10-502.4(a). If the HCC Board or any other public body is not alleged to have violated the Act, we have no jurisdiction to issue an opinion about its meeting practices. We can point out that the exceptions to §10-508(a) allowing for closed sessions are permissive: “A public body *may* meet in closed session” How a public body chooses to exercise this discretion, however, is not a matter suitable for a Compliance Board opinion.

B. Private Dinners

The HCC Board’s practice has been to hold a private dinner prior to its regular meetings. According to the complaint, these dinner sessions “were not open to the public and no vote was taken prior to any of the dinner sessions to close the meetings to the public.”

We have frequently addressed the status under the Act of meals at which a quorum of members of a public body is present. The legal issue is whether such a gathering is a “meeting” subject to the Act or, instead, is a “social gathering” not subject to the Act. *See* §§10-502(g) and 10-503(a)(2). We have consistently held that such a gathering is outside the Act “as long as the quorum refrains from the discussion of public business.” *3 Official Opinions of the Maryland Open Meetings Compliance Board* 257, 258 (2003) (Opinion 03-2). *See also, e.g., 3 Official Opinions of the Maryland Open Meetings Compliance Board* 224 (2002) (Opinion 02-11).

In his response, Mr. Stellman asserted that the HCC Board’s pre-meeting dinners are simply social events at which no public business is conducted. On this basis, we conclude that the Act does not apply to these dinners.

IV

Conclusion

In summary, the Open Meetings Compliance Board finds no violation of the Open Meetings Act either in connection with the closed session of the HCC Board on April 13, 2004, or the other closed sessions identified in the complaint.

OPEN MEETINGS COMPLIANCE BOARD

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